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January 26, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie R. Salas, Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: MM Docket No. 97-234

Dear Ms. Salas:

Transmitted herewith, on behalf of The National Translator Association, are an original and nine (9) copies of Comments of The National Translator Association on the Commission's Notice of Proposed Rulemaking in the above-referenced proceeding, In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, FCC 97-397 (November 26, 1997). The additional copies of the Comments are included so that each Commissioner may have a personal copy. Additional copies have been filed with the Mass Media Bureau Video Services Division and Audio Services Division, and the Office of General Counsel.

Any questions and copies of all correspondence relating to this filing should be directed to the undersigned

Very truly yours,



Joseph P. Benkert

Enclosure

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Before the
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-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television Fixed)	
Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

COMMENTS OF THE NATIONAL TRANSLATOR ASSOCIATION

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January 26, 1998

Its Attorney

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Summary of Argument

Translators provide a significant public service of extending the availability of free of-the-air television to Americans residing in rural America. Translators are often funded by charitable or religious organizations, local governmental entities through tax revenues or through informal local contributions by or assessments upon the populations receiving broadcast signals via the translators. They operate without federal funding.

Community-based translators providing significant public service are thus funded by the public receiving “free” over-the-air television and FM service from them rather than from the Federal government, and it would be ironic if the policies and rules adopted to balance the Federal Budget were to extinguish these marginal operations and federally-funded alternatives were required. While the Act does not appear to permit the Commission to grant translator licenses other than through auctions, the Commission should, in view of these facts, first pursue every alternative to auctions to resolve mutual exclusivity involving translators. Where auctions cannot be avoided, the Commission should not specify a minimum bid nor require up front payments from translator applicants. In addition, reasonable bid payment terms should be given winning translator applicants.

In those cases when an auction involving a translator application cannot be avoided, the Commission should not require upfront payments or auction deposits, and should grant translator applicants payment terms which are reasonable in the context of their financial status and fundraising methods.

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COMMENTS OF THE NATIONAL TRANSLATOR ASSOCIATION

The National Translator Association, by its attorneys and pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, hereby submits its comments on the Commission's Notice of Proposed Rulemaking in MM Docket No. 97-234, et seq., (In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses), FCC 97-397 (November 26, 1997)(the "NPRM").

I. Introduction

The National Translator Association (NTA) is a non-profit volunteer organization dedicated to the preservation of free over-the-air TV and FM radio in all areas of the United States. The membership is made up of organizations and individuals who are translator

licensees, persons who install and maintain translators, primary stations that operate translators and other interested in the objectives of the organization.

NTA's membership also includes applicants for television translator stations ("TV translators") and FM translator stations ("FM translators") (collectively, "translators") who are vitally interested in the auction process. Translators have been authorized by the Commission for the purpose of providing "free" off-air reception of television and FM radio programming to areas where such reception is unsatisfactory due to distance or intervening terrain. Translators thus provide a significant public service.

The populations which receive broadcast signals via translators generally finance the construction and operation of the translators themselves, through taxes or voluntary contributions, while in other cases the translators are financed by non-profit service or religious organizations, or primary stations seeking to fill out their coverage areas. The financial survival of translators is generally tenuous, and is being increasingly threatened by federal policies intended to balance the federal budget, and by alternative services which undermine support for translators.

If translator authorizations are granted by auction, the further expansion of the translator services will be limited, to the detriment of the public interest. While the auction provisions of the Communications Act of 1934, as amended, (the "Act"), do not appear to give the Commission the discretion to award mutually exclusive translator authorizations other than by auction, the Commission should expand the policies and rules it adopted in the *DTV Sixth Report and Order*¹ to employ engineering solutions and other alternatives to resolve mutual exclusivity and avoid auctions whenever possible. These alternatives should include

¹ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 7 CR 994 (April 21, 1997) ("*DTV Sixth Report and Order*").

permitting mutually exclusive translator applicants to amend their applications in ways that would be a major change and not permitted under the current processing rules such as, but not limited to, substituting a vacant channel or a different transmitter site, provided the station with the new parameters would serve essentially the same area as initially proposed.

The Commission should also provide reasonable payment terms for translator applicants which do prevail at auction, and should not establish a minimum bid or require an upfront payment or bid deposit.

II. Translators are Non-profit and Non-Commercial Stations Which Provide a Vital Public Service.

The purpose of translators is to retransmit the signals of full service television or FM broadcast stations, or LPTV stations to areas where the direct reception of such broadcast stations is unsatisfactory due to distance or intervening terrain barriers. *See* 47 C.F.R. §§ 74.731(a) and 74.1231(a). While translators do not meet the definition of “noncommercial educational broadcast stations” pursuant to Section 397(6) of the Act, which were exempted from auctions pursuant to the Budget Act,² they are nonetheless essentially non-profit operations. Few, if any, translator licensees originate commercial announcements.

A. Translators Provide a Vital Public Service

The Commission has long recognized that the use of translators promotes an efficient broadcasting service to all the people of the United States and are a method to help bring service to remote isolated communities and rural areas. *See Report and Order in Docket No. 15858*, 1 FCC 2d 15, 5 RR 2d 1702 (1965)(“*High Power TV Translators*”). TV translators

² *See* Section 3002(a)(2)(C) of the Balanced Budget Act of 1997 Pub. L. No. 105-33, 111 Stat. 251 (1997)(the “Budget Act”), codified at 47 USC §309(j)(2)(C)

thus serve the mandate of Section 307(b) of the Act, 47 USC §307(b), that “[i]n considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Translators provide the important public function of extending to rural and isolated populations the signals of full service broadcast stations licensed to more densely populated and less-isolated areas. Translators thus extend to these remote populations the common experiences and common knowledge of events which binds Americans together as a people and a nation. Translators generally retransmit the signals of the nearest full service stations and, to the credit of the full service stations, those stations are often sensitive to the news and public affairs interests of the communities served by translators, and for example, to broadcast weather forecasts and warnings of severe weather in the areas which receive their programming via translator.³

Indeed, Congress recognized the importance of free over-the-air broadcast service in enacting the Budget Act. The Commerce Committee stated, in the context of providing that television licensees should not be required to surrender their analog licenses until the percentage of households relying exclusively upon over-the-air analog television broadcast signal is five percent or less: “The Committee believes that the provision of free, over the air television is an important governmental interest.” H. Report No. 105-149, 105th Cong., 1st

¹ The full service stations which are primary stations for the translators sometimes make technicians available to assist the translator licensees with the maintenance of the translator stations. This assistance is limited, and monetary assistance is not generally provided, because the incremental increase in audience from operation of any single translator is not considered to justify the costs involved. As explained below, translators are typically funded by those receiving broadcast signals via the translator.

Sess. at 570 (1997). Congress also charged the Commission with implementing a system of competitive bidding which would promote, *inter alia*, the objective of “the development and rapid deployment of new technologies, products and services for the benefit of the public, *including those residing in rural areas*, without administrative or judicial delays.” 47 USC §309(j)(3)(a) (emphasis added). The Commission should also, of course, see to the continuing deployment of extant services to rural areas where such deployment is inadequate.

The Commission conceded that its authorization of high-power TV translators was “in no way a solution to the problem of inadequate television service to all parts of the country, but . . . merely [] another step in the direction of a solution to this problem.” *Report and Order in Docket No. 15858*, at para. 11. NTA submits that the Commission has not yet achieved a solution to the problem of inadequate television service to all parts of the country, and that regulatory and legislative developments threaten to undermine the progress which has been made. For example, cable systems (which receive must carry and retransmission consent signals off air from translators, often without compensation to the translators) and direct broadcast satellites siphon off those potential contributors to the translators who can afford these subscription services, leaving the translators a smaller pool of supporters consisting of those who can least afford to support the translators. In recent years, many translator applicants and licensees have been required to pay new applications and spectrum fees under the Commission’s rules, and to pay new and/or increased right of way fees for use of right of ways granted by the Bureau of Land Management and Forest Service. These new regulatory fees which have been imposed to address the federal budget deficit, threaten the continued operation of the shoestring budget translators. Now, Congress has required that translator authorizations be auctioned, and that frequencies used by translators be reallocated for public safety use.

B. Translators Operate On a Non-Profit, Non-commercial Basis

There are several ways in which translators are funded, with the vast majority of translators being operated on a non-profit, non-commercial basis. Some translators are licensed to non-profit educational or religious organizations, which operate the translators to provide educational or religious programming in rural areas, urban areas, or both. Other translators are licensed to county governments or special tax districts authorized under state law, and are necessarily operated on a non-commercial basis. Examples of such licensees include the Blue Mountain Translator District in Oregon, Elko Television District in Nevada, and Mohave County (Arizona) Board of County Supervisors.

Translators are also often licensed to service organizations, such as the Bryce (Utah) Lions Club and the Cooper Landing (Alaska) Lions Club which fund the operation of the translators as a public service project. Television Clubs or translator Clubs and other entities including informal associations have been formed among residents of remote or rural areas to provide television and/or radio service to their area. Examples include the Garfield (Montana) TV Club and the Circle TV Booster Club, Inc. in Circle Montana. In many cases these organizations have not gone to the expense of incorporating or obtaining an IRS determination that they qualify as a non-profit organization under Section 503 of the Tax Code, because the expense of doing so would be prohibitive in the context of their marginal funding. There are also cases in which translators are operating on a community-funded basis licensed to individuals.

Not only are the vast majority of translators operated on a not-for-profit basis, they are also operated on a non-commercial basis. That is, although the programming of the primary stations may include commercial announcements, commercials are not inserted by the translators. While translators are authorized to originate local messages of up to 30 seconds in

length, no more than once per hour, for the broadcast of announcements to solicit or acknowledge financial contributions,⁴ translators have not generally found the origination of such announcements to be cost-effective.

The Commission has recognized the marginal operation of translator stations, which provide a vital public service. The Commission has stated:

[Community-based Translators] are generally not affiliated with commercial broadcasters, are non-profit, non-profitable, or only marginally profitable, serve small rural communities, and are supported financially of the residents of the communities served. Even those translators that are nominally for profit often sell no advertising and have no way of requiring viewers who receive their signals to pay a subscriber fee. These translator licensees, as a whole, are different from other classes of commercial regulatees because they have no advertising revenue and usually have no mechanism for enforcing payment from members of the public who benefit from their services.

Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, 10 FCC Rcd 12759, 78 RR 2d 210, 1995 Lexis 4120, para. 16 (1995). Governmental and noncommercial educational translator licensees are exempt from spectrum fees.

Community-based translators providing significant public service are thus funded by the public receiving “free” over-the-air television and FM service from them rather than from the Federal government, and it would be ironic if the policies and rules adopted to balance the Federal Budget were to extinguish these marginal operations and federally-funded alternatives were required. While the Act does not appear to permit the Commission to grant translator licenses other than through auctions, the Commission should, in view of these facts, first pursue every alternative to auctions to resolve mutual exclusivity involving translators. Where auctions cannot be avoided, the Commission should not specify a minimum bid nor require up front payments from translator applicants. In addition, reasonable bid payment terms should be given winning translator applicants.

⁴ See, 47 C.F.R. §§ 74.731(f), 74.1321(g).

III. The Commission Should Pursue Every Alternative to Auctions Before Auctioning Translator Authorizations.

In the *DTV Sixth Report and Order*, the Commission amended its rules to provide additional flexibility to accommodate TV translator and LPTV operations during and after the transition to digital television (“DTV”). This flexibility included (i) the ability of TV translator stations displaced by DTV stations to apply for a suitable replacement channel in the same area on a first-come, first-served basis, without being subject to competing applications, (ii) removal or relaxation of various restrictions imposed by the applicable technical rules (i.e., certain UHF taboos), (iii) allowing such stations to make use of terrain shielding and other interference abatement techniques to demonstrate that interference will not occur, and (iv) permitting such stations and applicants to accept interference.

Nothing in the auction provisions of the Budget Act prevents the Commission from providing TV translators the flexibility granted them in the *DTV Sixth Report and Order*. In fact, the auction provisions of the Communications Act support broadening this flexibility and extending similar flexibility to FM translators. Section 309(j)(6)(E) of the Communications Act, provides that nothing in the subsection, or in the use of competitive bidding, “shall be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.” 47 USC §309(j)(6)(E). Accordingly, the Commission should permit translator applicants and other, mutually exclusive, applicants to negotiate resolution of their mutual exclusivity through the commencement of the actual auction, without being deemed to be in contravention of the anti-collusion rules.

Further, the Commission should permit mutually exclusive applicants to amend their applications to specify different channels or transmitter sites, or make other significant

changes, so long as no new mutual exclusivity or unaccepted interference would result. The Commission's rules currently prohibit such major amendments. The alternative to permitting such amendments in the auction context, however, would likely be that translator applicants seeking a channel on which to operate would apply for an unused channel, and if coincidentally the application was mutually exclusive with another application, would dismiss the application and reapply for another channel during the next application filing window. This would unnecessarily waste the applicant's limited resources and delay additional service to the public as the applicant applies and reapplies for a channel to serve the same area. The NTA notes that any interested party would have had an equal opportunity to apply for the alternate channel, or for the channel at the alternate site in the filing window; there would be no need to provide a further opportunity for the filing of competing applications.

Permitting mutually exclusive translator applicants to modify their proposed channel or transmitter location should result in a net reduction in the Commission's administrative burdens in processing and granting translator applications. The Commission has already proposed to limit the pre-auction processing of such applications to that necessary to identify mutually exclusive technical proposals. Only those applications which are not mutually exclusive with any other applications, or which prevail at auction, will be full processed. Permitting such amendments to mutually exclusive applications will eliminate the need for auctions to be conducted, and for the re-filing (and re-processing) of applications specifying such alternate channels or sites in subsequent windows.

Finally, with respect to the impact upon the Commission's administrative burden, complex daisy-chain mutual exclusivities which would provide for very complex auctions could be greatly simplified by permitting such amendments. Where complex daisy-chains of translator applications must be auctioned, the Commission will likely find itself having to weigh cumulative bids of alternate groups of applicants. Daisy-chain auctions would be

equally complex for the applicants, and special difficulties would be posed under the bidding rules where an applicant does not bid in the auction, yet the mutual exclusivity involving the applicant is resolved because a third bidder outbids the applicant whose applications conflicted with the first applicants. These daisy-chains, and the difficulties they pose for the Commission and applicants alike, can be minimized where the applicants may amend their applications to eliminate the mutual exclusivities. Even if all of the mutual exclusivities making up the daisy-chain are not resolved, the daisy chains can be reduced to several smaller and more manageable application groups.

The Commission should also extend to FM translator applicants the same flexibility to make use of terrain shielding and other interference abatement techniques, accept interference from other FM translator or full services FM stations, and to amend their applications to specify other channels or sites to resolve mutual exclusivities. There is no reason not to extend such flexibility to FM translators, permitting them greater latitude in providing service to under-served areas.

IV. The Commission Should Grant Translator Applicants Bidding Credits and Payment Terms.

In those cases when an auction involving a translator application cannot be avoided, the Commission should not require upfront payments or auction deposits, and should grant translator applicants payment terms which are reasonable in the context of their financial status and fundraising methods.

Translator applicants raise the funds to apply for, construct and operate the translator stations through annual taxes or fund drives, or ongoing public contributions or charitable giving. It is difficult enough for entities with these funding mechanisms to accumulate the funds necessary to construct and operate translator stations. Requiring auction deposits and the

prompt payment of winning bids will effectively preclude most translator applicants from participating in license auctions, and would certainly delay service to the public as potential applicants accumulate the funds necessary to make these payments.

To avoid delays in the commencement of new translator service, the Commission should not require auction deposits or upfront payments from translator applicants. Further, the Commission should permit all translator applicants which prevail in license auctions to pay their bid over an eight year term (equivalent to a full license term) in monthly, quarterly or annual installments at the licensee's election. The payment term should commence upon grant of the license, and interest should not accrue. Such payment terms may permit some translator applicants to bid modest amounts at auction, and to provide free over-the-air broadcast signals to rural residents without the need for grants or other financial assistance from the federal government.⁵ The bids can thus be funded out of the receipts which are in part generated by the new station.⁶

V. Conclusion

Television and FM translator stations provide a vital public service to rural America, are funded by those who receive the signals, and operate on a non-profit or nonprofitable basis. The Commission should adopt auction rules which afford translator applicants the greatest

⁵ In the event that a translator authorization obtained through the auction process is modified to an LPTV authorization prior to expiration of the eight year bid payment term, it would be appropriate for the Commission to require the then-outstanding balance be immediately paid, with interest applied.

⁶ If payments toward the bid amount are required prior to grant of the license, then the Commission should provide for the refund of any payments if a license cannot ultimately be granted.

flexibility possible to avoid auctions, and grant reasonable bid payment terms in those cases where auctions are required.

Respectfully submitted,

National Translator Association

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